

109TH CONGRESS  
1ST SESSION

# H. R. 2331

To restore and strengthen the laws that provide for an open and transparent  
Federal Government.

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## IN THE HOUSE OF REPRESENTATIVES

MAY 12, 2005

Mr. WAXMAN (for himself, Ms. PELOSI, Mr. CLAY, Mr. CONYERS, Mr. CUMMINGS, Mr. DOGGETT, Mr. KUCINICH, Mr. LANTOS, Mr. LYNCH, Ms. MCCOLLUM of Minnesota, Mr. McDERMOTT, Mrs. MALONEY, Ms. NORTON, Ms. LINDA T. SÁNCHEZ of California, Mr. SANDERS, Ms. SCHAKOWSKY, Ms. SLAUGHTER, Mr. STARK, Mr. VAN HOLLEN, and Ms. WOOLSEY) introduced the following bill; which was referred to the Committee on Government Reform, and in addition to the Committee on Homeland Security, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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## A BILL

To restore and strengthen the laws that provide for an  
open and transparent Federal Government.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

### 3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Restore Open Govern-  
5 ment Act of 2005”.

1 **SEC. 2. TABLE OF CONTENTS.**

2 The table of contents for this Act is as follows:

- Sec. 1. Short title.
- Sec. 2. Table of contents.
- Sec. 3. Promotion of public disclosure.
- Sec. 4. Revocation of the Ashcroft and Card Memoranda that encourage the withholding of information.
- Sec. 5. Elimination of unnecessary pseudo-classification.
- Sec. 6. Restoration of public access to presidential records.
- Sec. 7. Prohibition on secret advisory committees.
- Sec. 8. Promotion of timely declassification of Government documents.
- Sec. 9. Improvements to operation of Freedom of Information Act.

3 **SEC. 3. PROMOTION OF PUBLIC DISCLOSURE.**

4 (a) FINDINGS.—Congress finds the following:

5 (1) Public access to information held by the  
6 Federal Government is vitally important to the func-  
7 tioning of a democratic society.

8 (2) The Freedom of Information Act was en-  
9 acted to ensure such public access to information.

10 (3) The Freedom of Information Act specifies  
11 limited exemptions to the general requirement for  
12 disclosure, where disclosure could potentially threat-  
13 en other important public policy goals.

14 (4) In establishing the categories of exempt in-  
15 formation under the Freedom of Information Act,  
16 Congress allowed agencies to withhold information in  
17 those categories, but did not in any way mandate or  
18 encourage such withholding.

19 (b) POLICY.—The policy of the Federal Government  
20 is to release information to the public in response to a  
21 request under the Freedom of Information Act—

1 (1) if such release is required by law; or

2 (2) if such release is allowed by law and the  
3 agency concerned does not reasonably foresee that  
4 disclosure would be harmful to an interest protected  
5 by an applicable exemption.

6 (c) GUIDANCE.—All guidance provided to Federal  
7 Government employees responsible for carrying out the  
8 Freedom of Information Act shall be consistent with the  
9 policy set forth in subsection (b).

10 **SEC. 4. REVOCATION OF THE ASHCROFT AND CARD MEMO-**  
11 **RANDA THAT ENCOURAGE THE WITH-**  
12 **HOLDING OF INFORMATION.**

13 The “Memorandum for Heads of all Federal Depart-  
14 ments and Agencies” on “The Freedom of Information  
15 Act” issued by Attorney General John Ashcroft on Octo-  
16 ber 12, 2001, and the “Memorandum for the Heads of  
17 Executive Department and Agencies” on “Action to Safe-  
18 guard Information Regarding Weapons of Mass Destruc-  
19 tion and Other Sensitive Documents Related to Homeland  
20 Security” issued by Andrew H. Card, Jr., Assistant to the  
21 President and Chief of Staff, on March 19, 2002, shall  
22 have no force or effect.

1 **SEC. 5. ELIMINATION OF UNNECESSARY PSEUDO-CLASSI-**  
2 **FICATION.**

3 (a) REPORT ON THE PROLIFERATING USE OF PSEU-  
4 DO-CLASSIFICATION DESIGNATIONS.—

5 (1) REPORT REQUIREMENT.—Not later than  
6 nine months after the date of the enactment of this  
7 Act, the Archivist of the United States shall submit  
8 to the congressional committees described in sub-  
9 section (d) a report describing the use of pseudo-  
10 classification designations.

11 (2) MATTERS COVERED.—The Archivist shall  
12 report on, at a minimum, the following:

13 (A) The number of pseudo-classification  
14 designation policies used by Federal agencies,  
15 and a list of each of the pseudo-classification  
16 designations that includes the agency or agen-  
17 cies that use the designation.

18 (B) Any existing guidance, instruction, di-  
19 rective, or regulations regarding each agency's  
20 use of the pseudo-classification designations.

21 (C) The number of documents categorized  
22 by each agency in each of the previous three fis-  
23 cal years under each designation.

24 (D) The number and level of experience  
25 and training of Federal agency, office, and con-

1 tractor personnel authorized to make pseudo-  
2 classification designations.

3 (E) The cost of placing and maintaining  
4 information under each pseudo-classification  
5 designation.

6 (F) The extent to which information placed  
7 under pseudo-classification designations has  
8 subsequently been released under section 552 of  
9 title 5, United States Code (popularly known as  
10 the Freedom of Information Act).

11 (G) The extent to which pseudo-classifica-  
12 tion designations have been used to withhold  
13 from the public information that is not author-  
14 ized to be withheld by Federal statute, or by an  
15 Executive order relating to the classification of  
16 national security information.

17 (H) The statutory provisions described in  
18 subsection (c).

19 (3) INPUT FROM OTHER FEDERAL AGENCIES.—

20 In order to report on the use of pseudo-classification  
21 designations, the Archivist shall solicit and consider  
22 input from Federal agencies, offices, and contrac-  
23 tors, and all federal agencies, offices, and contrac-  
24 tors shall cooperate fully and promptly with all re-

1 requests by the Archivist in the fulfillment of this sec-  
2 tion.

3 (4) NOTICE AND COMMENT.—The Archivist  
4 shall provide notice and an opportunity for public  
5 comment on the report.

6 (b) ELIMINATION OF UNNECESSARY PSEUDO-CLAS-  
7 SIFICATION DESIGNATIONS.—

8 (1) REGULATIONS.—Not later than 15 months  
9 after the date of the enactment of this Act, the Ar-  
10 chivist of the United States shall promulgate regula-  
11 tions banning the use of unnecessary pseudo-classi-  
12 fication designations.

13 (2) STANDARDS FOR INFORMATION CONTROL  
14 DESIGNATIONS.—If the Archivist determines that  
15 there is a need for some agencies to use information  
16 control designations to safeguard information prior  
17 to review for disclosure, beyond those designations  
18 established by statute or by an Executive Order re-  
19 lating to the classification of national security infor-  
20 mation, the regulations under paragraph (1) shall  
21 establish standards for the use of those designations  
22 by agencies. Such standards shall address, at a min-  
23 imum, the following issues:

24 (A) Standards for utilizing the information  
25 control designations in a manner that is nar-

1 rowly tailored to maximize public access to in-  
2 formation.

3 (B) Procedures for providing specified  
4 Federal officials with authority to utilize the in-  
5 formation control designations, including train-  
6 ing and certification requirements.

7 (C) Categories of information that may be  
8 assigned the information control designations.

9 (D) The duration of the information con-  
10 trol designations and the process by which they  
11 will be removed.

12 (E) Procedures for identifying, marking,  
13 dating, and tracking information assigned the  
14 information control designations, including the  
15 identity of officials making the designations.

16 (F) Specific limitations and prohibitions  
17 against using the information control designa-  
18 tions.

19 (G) Procedures for members of the public  
20 to challenge the use of the information control  
21 designations.

22 (H) The manner in which the use of the  
23 information control designations relates to the  
24 procedures of each agency or office under sec-  
25 tion 552 of title 5, United States Code.

1           (3) REGULATION TO CONSTITUTE SOLE AU-  
2           THORITY.—A regulation promulgated pursuant to  
3           this subsection shall constitute the sole authority by  
4           which Federal agencies, offices, or contractors are  
5           permitted to control information for the purposes of  
6           safeguarding information prior to review for disclo-  
7           sure, other than authority granted by Federal stat-  
8           ute or by an Executive order relating to the classi-  
9           fication of national security information.

10          (c) REVIEW OF STATUTORY BARRIERS TO PUBLIC  
11          ACCESS TO INFORMATION.—

12               (1) REVIEW OF STATUTES.—As part of the re-  
13               port required under subsection (a), the Archivist  
14               shall examine existing Federal statutes that allow  
15               Federal agencies, offices, or contractors to control,  
16               protect, or otherwise withhold information based on  
17               security concerns.

18               (2) RECOMMENDATIONS.—The report shall  
19               make recommendations on potential changes to the  
20               Federal statutes examined under paragraph (1) that  
21               would improve public access to information governed  
22               by such statutes.

23          (d) DEFINITIONS.—In this section:

24               (1) The term “congressional committees”  
25               means the Committees on Government Reform, Ju-

1        diciary, Homeland Security, and Appropriations of  
2        the House of Representatives and the Committees  
3        on Homeland Security and Governmental Affairs,  
4        Judiciary, and Appropriations of the Senate.

5            (2) The term “pseudo-classification designa-  
6        tions” means information control designations, in-  
7        cluding “sensitive but unclassified” and “for official  
8        use only,” that are not defined by Federal statute,  
9        or by an Executive order relating to the classifica-  
10      tion of national security information, but that are  
11      used to manage, direct, or route Government infor-  
12      mation, or control the accessibility of Government  
13      information, regardless of its form or format.

14 **SEC. 6. RESTORATION OF PUBLIC ACCESS TO PRESI-**  
15 **DENTIAL RECORDS.**

16        Executive Order number 13233, dated November 1,  
17        2001 (66 Fed. Reg. 56025), shall have no force or effect,  
18        and Executive Order number 12667, dated January 18,  
19        1989 (54 Fed. Reg. 3403), shall apply by its terms.

20 **SEC. 7. PROHIBITION ON SECRET ADVISORY COMMITTEES.**

21        (a) DEFINITION.—The term “Presidential inter-  
22        agency advisory committee” is any committee or task force  
23        that—

1           (1) is composed wholly of full-time, or perma-  
2           nent part-time, officers or employees of the Federal  
3           Government;

4           (2) includes officers or employees of at least  
5           two separate Federal agencies;

6           (3) is established or utilized to provide advice,  
7           ideas, or recommendations to the President or Vice  
8           President on a specified topic or topics; and

9           (4) has at least one officer or employee as-  
10          signed full-time as a staff member of the committee  
11          to support the functions of the committee.

12         (b) REQUIREMENTS.—

13           (1) The President shall ensure that the names  
14           of the members of the committee are published in  
15           the Federal Register.

16           (2) The committee must make public each sub-  
17           stantive contact between the advisory committee, or  
18           individual members of the advisory committee acting  
19           on the committee's behalf, and any person who is  
20           not a full-time or permanent part-time officer or em-  
21           ployee of the Federal Government, including—

22                   (A) the date of the contact;

23                   (B) the form of the contact (in person, by  
24           telephone, by e-mail, or in writing);

1 (C) the names and affiliations of the par-  
 2 ties involved; and

3 (D) the substance of the communication  
 4 and the communication itself, if in electronic or  
 5 written form.

6 (3) For purposes of this subsection, a contact  
 7 shall be considered substantive if the information  
 8 conveyed influenced or was reflected in any way in  
 9 the committee's advice, recommendations, or report  
 10 to the President or Vice President.

11 (c) APPLICABILITY.—The requirements of this sec-  
 12 tion do not apply to substantive contacts exclusively with  
 13 the President or the Vice President or their immediate  
 14 personal staff.

15 **SEC. 8. PROMOTION OF TIMELY DECLASSIFICATION OF**  
 16 **GOVERNMENT DOCUMENTS.**

17 (a) FUNDING.—Section 708 of the Public Interest  
 18 Declassification Act of 2000 (title VII of Public Law 106–  
 19 567; 50 U.S.C. 435 note; 114 stat. 2856) is amended by  
 20 adding at the end the following new subsection:

21 “(c) FUNDING.—For any fiscal year in which funds  
 22 appropriated pursuant to the authorization in subsection  
 23 (a) are insufficient, as determined by the Archivist of the  
 24 United States, to support the activities of the Board, the  
 25 Archivist shall levy from each agency, and may retain, a

1 fee of not more than \$0.005 per page classified by each  
 2 agency. The Archivist shall use the fees retained under  
 3 this section to fund the activities of the Board. Fees re-  
 4 ceived in a fiscal year and retained under this section shall  
 5 remain available for obligation until expended.”.

6 (b) SUNSET.—Subsection (b) of section 710 of such  
 7 Act is amended to read as follows:

8 “(b) SUNSET.—The provisions of this title shall ex-  
 9 pire 8 years after the date of the enactment of the Restore  
 10 Open Government Act of 2005.”.

11 **SEC. 9. IMPROVEMENTS TO OPERATION OF FREEDOM OF**  
 12 **INFORMATION ACT.**

13 (a) RESTORATION OF THE INTEGRITY OF THE FREE-  
 14 DOM OF INFORMATION ACT BY LIMITING THE BROAD EX-  
 15 EMPTION FOR CRITICAL INFRASTRUCTURE INFORMATION  
 16 UNDER THE HOMELAND SECURITY ACT OF 2002.—

17 (1) IN GENERAL.—Title II of the Homeland Se-  
 18 curity Act of 2002 (Public Law 107–296) is amend-  
 19 ed by striking subtitle B and inserting the following:

20 **“Subtitle B—Protection of Volun-**  
 21 **tarily Furnished Confidential**  
 22 **Information**

23 **“SEC. 211. PROTECTION OF VOLUNTARILY FURNISHED**  
 24 **CONFIDENTIAL INFORMATION.**

25 “(a) DEFINITIONS.—In this section:

1           “(1) CRITICAL INFRASTRUCTURE.—The term  
2           ‘critical infrastructure’ has the meaning given that  
3           term in section 1016(e) of the USA PATRIOT ACT  
4           of 2001 (42 U.S.C. 5195c(e)).

5           “(2) FURNISHED VOLUNTARILY.—

6                   “(A) DEFINITION.—The term ‘furnished  
7           voluntarily’ means a submission of a record  
8           that—

9                           “(i) is made to the Department in the  
10                          absence of authority of the Department re-  
11                          quiring that record to be submitted; and

12                           “(ii) is not submitted or used to sat-  
13                          isfy any legal requirement or obligation or  
14                          to obtain any grant, permit, benefit (such  
15                          as agency forbearance, loans, or reduction  
16                          or modifications of agency penalties or rul-  
17                          ings), or other approval from the Govern-  
18                          ment.

19                          “(B) BENEFIT.—In this paragraph, the  
20                          term ‘benefit’ does not include any warning,  
21                          alert, or other risk analysis by the Department.

22           “(b) IN GENERAL.—Notwithstanding any other pro-  
23           vision of law, a record pertaining to the vulnerability of  
24           and threats to critical infrastructure (such as attacks, re-  
25           sponse, and recovery efforts) that is furnished voluntarily

1 to the Department shall not be made available under sec-  
2 tion 552 of title 5, United States Code, if—

3 “(1) the provider would not customarily make  
4 the record available to the public; and

5 “(2) the record is designated and certified by  
6 the provider, in a manner specified by the Depart-  
7 ment, as confidential and not customarily made  
8 available to the public.

9 “(c) RECORDS SHARED WITH OTHER AGENCIES.—

10 “(1) IN GENERAL.—

11 “(A) RESPONSE TO REQUEST.—An agency  
12 in receipt of a record that was furnished volun-  
13 tarily to the Department and subsequently  
14 shared with the agency shall, upon receipt of a  
15 request under section 552 of title 5, United  
16 States Code, for the record—

17 “(i) not make the record available;  
18 and

19 “(ii) refer the request to the Depart-  
20 ment for processing and response in ac-  
21 cordance with this section.

22 “(B) SEGREGABLE PORTION OF  
23 RECORD.—Any reasonably segregable portion of  
24 a record shall be provided to the person re-

1           questing the record after deletion of any portion  
2           which is exempt under this section.

3           “(2) DISCLOSURE OF INDEPENDENTLY FUR-  
4           NISHED RECORDS.—Notwithstanding paragraph (1),  
5           nothing in this section shall prohibit an agency from  
6           making available under section 552 of title 5, United  
7           States Code, any record that the agency receives  
8           independently of the Department, regardless of  
9           whether or not the Department has a similar or  
10          identical record.

11          “(d) WITHDRAWAL OF CONFIDENTIAL DESIGNA-  
12          TION.—The provider of a record that is furnished volun-  
13          tarily to the Department under subsection (b) may at any  
14          time withdraw, in a manner specified by the Department,  
15          the confidential designation.

16          “(e) PROCEDURES.—The Secretary shall prescribe  
17          procedures for—

18                  “(1) the acknowledgement of receipt of records  
19                  furnished voluntarily;

20                  “(2) the designation, certification, and marking  
21                  of records furnished voluntarily as confidential and  
22                  not customarily made available to the public;

23                  “(3) the care and storage of records furnished  
24                  voluntarily;

1           “(4) the protection and maintenance of the con-  
2           fidentiality of records furnished voluntarily; and

3           “(5) the withdrawal of the confidential designa-  
4           tion of records under subsection (d).

5           “(f) EFFECT ON STATE AND LOCAL LAW.—Nothing  
6 in this section shall be construed as preempting or other-  
7 wise modifying State or local law concerning the disclosure  
8 of any information that a State or local government re-  
9 ceives independently of the Department.

10          “(g) REPORT.—

11           “(1) REQUIREMENT.—Not later than 18  
12 months after the date of the enactment of the Re-  
13 store Open Government Act of 2005, the Comp-  
14 troller General of the United States shall submit to  
15 the committees of Congress specified in paragraph  
16 (2) a report on the implementation and use of this  
17 section, including—

18           “(A) the number of persons in the private  
19 sector, and the number of State and local agen-  
20 cies, that furnished voluntarily records to the  
21 Department under this section;

22           “(B) the number of requests for access to  
23 records granted or denied under this section;  
24 and

1 “(C) such recommendations as the Comp-  
2 troller General considers appropriate regarding  
3 improvements in the collection and analysis of  
4 sensitive information held by persons in the pri-  
5 vate sector, or by State and local agencies, re-  
6 lating to vulnerabilities of and threats to critical  
7 infrastructure, including the response to such  
8 vulnerabilities and threats.

9 “(2) COMMITTEES OF CONGRESS.—The com-  
10 mittees of Congress specified in this paragraph  
11 are—

12 “(A) the Committees on the Judiciary and  
13 Homeland Security and Governmental Affairs  
14 of the Senate; and

15 “(B) the Committees on the Judiciary and  
16 Government Reform of the House of Represent-  
17 atives.

18 “(3) FORM.—The report shall be submitted in  
19 unclassified form, but may include a classified  
20 annex.”.

21 (2) TECHNICAL AND CONFORMING AMEND-  
22 MENT.—The table of contents for the Homeland Se-  
23 curity Act of 2002 (Public Law 107–296) is amend-  
24 ed by striking the items relating to subtitle B of title

1        II and sections 211 through 215 and inserting the  
 2        following:

      “Subtitle B—Protection of Voluntarily Furnished Confidential Information  
 “Sec. 211. Protection of voluntarily furnished confidential information.”.

3        (b) CREATION OF TRANSPARENCY IN AGENCY COM-  
 4        PLIANCE WITH THE FREEDOM OF INFORMATION ACT.—

5            (1) ADDITIONAL MATTERS COVERED BY RE-  
 6        PORT.—Section 552(e)(1) of title 5, United States  
 7        Code, is amended—

8            (A) by striking “fiscal year and which”  
 9            and inserting “fiscal year. Information in the  
 10          report shall be expressed in terms of each prin-  
 11          cipal component of the agency and”;

12          (B) in subparagraph (E), by inserting be-  
 13          fore the semicolon “, based on the date on  
 14          which the requests were originally filed with the  
 15          agency”; and

16          (C) by redesignating subparagraphs (F)  
 17          and (G) as subparagraphs (L) and (M), respec-  
 18          tively, and inserting after subparagraph (E) the  
 19          following new subparagraphs:

20            “(F) based on the number of business days  
 21            that have elapsed since each request was origi-  
 22            nally filed with the agency—

23            “(i) the number of requests for  
 24            records for which the agency has re-

1           sponded with a determination up to and  
2           including 20 days, and in 20 day incre-  
3           ments up to and including 200 days;

4           “(ii) the number of requests for  
5           records for which the agency has re-  
6           sponded with a determination greater than  
7           200 days and less than 301 days;

8           “(iii) the number of requests for  
9           records for which the agency has re-  
10          sponded with a determination greater than  
11          300 days and less than 401 days;

12          “(iv) the number of requests for  
13          records for which the agency has re-  
14          sponded with a determination greater than  
15          400 days;

16          “(v) the average number of days for  
17          the agency to respond to a request;

18          “(G) data on the 10 requests for records  
19          with the earliest filing dates pending before the  
20          agency as of September 30 of the preceding  
21          year, including the number of business days  
22          that have elapsed since each of the requests was  
23          originally filed with the agency;

24          “(H) data on the 10 active administrative  
25          appeals with the earliest filing dates pending

1 before the agency as of September 30 of the  
2 preceding year, including the number of busi-  
3 ness days that have elapsed since the requests  
4 were originally filed with the agency;

5 “(I) the median and average number of  
6 days for the agency to respond to administra-  
7 tive appeals based on the date on which the ap-  
8 peals originally were filed with the agency; the  
9 highest number of business days taken by the  
10 agency to respond to an administrative appeal;  
11 and the lowest number of business days taken  
12 by the agency to respond to an administrative  
13 appeal;

14 “(J) the number of fee status requests  
15 that are granted and denied, and the average  
16 number of days for adjudicating fee status de-  
17 terminations;

18 “(K) the number of expedited review re-  
19 quests that are granted and denied, and the av-  
20 erage number of days for adjudicating expe-  
21 dited review requests;”.

22 (2) NO AGGREGATION OF REPORTS.—Section  
23 552(e) of such title is further amended by adding at  
24 the end the following new paragraph:

1 “(6) The reports required by this section shall not  
2 aggregate requests for records to the agency made under  
3 subsection (a) with requests for records to the agency  
4 made by first parties under section 552a of this title.”.

5 (c) INCREASED FEASIBILITY OF CITIZEN GROUP  
6 CHALLENGES TO IMPROPER WITHHOLDING OF GOVERN-  
7 MENT INFORMATION.—Section 552(a)(4)(E) of title 5,  
8 United States Code, is amended—

9 (1) by inserting “, or in any case seeking infor-  
10 mation from a Federal agency or official under any  
11 other Federal law,” after “case under this section”;  
12 and

13 (2) by adding at the end the following: “For  
14 purposes of this section, a complainant has ‘substan-  
15 tially prevailed’ if the complainant has obtained  
16 some of its requested relief through a judicial or ad-  
17 ministrative order or an enforceable written agree-  
18 ment, or if the complainant’s pursuit of a nonfrivo-  
19 lous claim or defense has been a catalyst for a vol-  
20 untary or unilateral change in position by the oppos-  
21 ing party that provides any significant part of the  
22 relief sought.”.

○